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FILED
SEP 27 1944
CHARLES ELMORE DOWLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 402

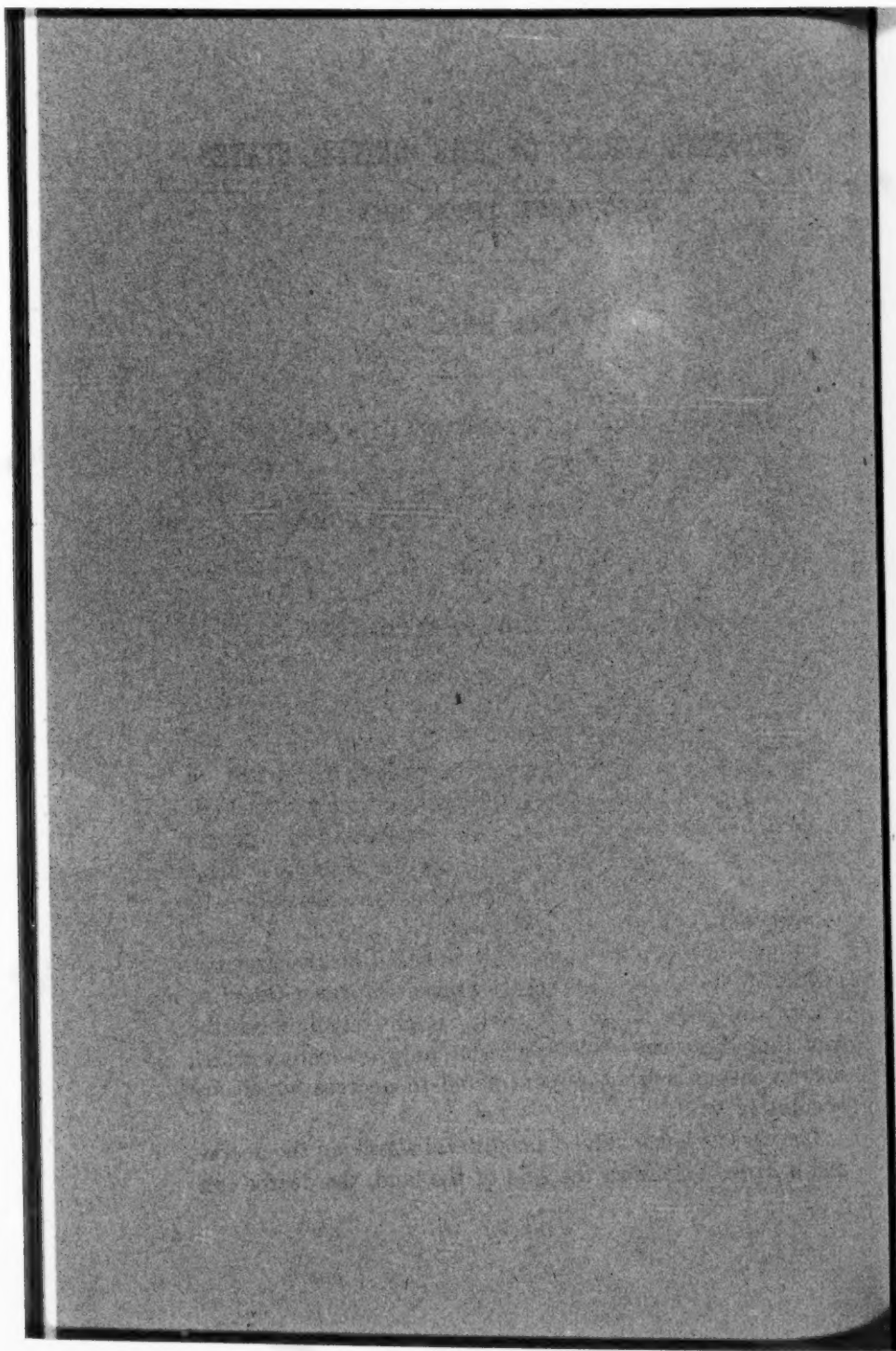
OWEN A. FRANK AND DOBOTHEA FRANK,
Petitioners,

vs.

COUNTY OF SCOTTS BLUFF, NEBRASKA

REPLY BRIEF OF PETITIONERS

THOMAS M. MORROW,
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Counsel for Petitioners.



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Argument

The only issue presented by respondent in its brief is whether or not the Federal question was timely raised. It is tacitly conceded that the question was raised in a proper manner. It is not urged that the question is unsubstantial. The argument advanced by respondent is so misleading as to require the filing of a reply brief.

Respondent's entire contention is based on the first two syllabi of the opinion of the Nebraska Supreme Court as set out on page six of its brief. It entirely ignores the fact that these rules are applicable only to decrees which are erroneous merely as contrasted to decrees which are absolutely void.

The case at bar involved a *collateral* attack on the decree, and a *direct* attack on the sale of the land, the decree con-

firming said sale and the decision of the Nebraska Supreme Court affirming said decree. None of the cases cited by the court provide justification for the refusal by the Nebraska courts to give petitioners the benefits conferred upon all citizens of Nebraska by the provisions of Section 77-2045, C. S. 1929. None of said cases involved any question of the jurisdiction of the court to enter the decree of foreclosure. In none was the judgment or decree preceding the sale attacked as void for want of jurisdiction. In all of these cases the decree ordering the sale was attacked merely as erroneous or irregular. The same is true of the cases cited in support of the second syllabus. Therefore, the rules announced in all of these cases, and stated in the syllabi in the present case on the second appeal herein, are subject to the limitation that said rules presuppose the existence of a valid decree, which the court had *jurisdiction* to enter, and have no application whatsoever in any case where the face of the record affirmatively shows the decree to be absolutely void for lack of jurisdiction of the court to enter such decree.

The *Acton* case demonstrates this beyond cavil. In it, as in this case, the decree was attacked *for the first time* on objection to confirmation of sale. The decree had become final for failure to appeal therefrom. Nevertheless, the Supreme Court of Nebraska *went back of the decree* under circumstances identical with those in this case, and sustained the appellant's *collateral* attack on said decree.

Since the decree herein is collaterally attacked, it follows that the attack was made in time, and it was unnecessary that the invalidity of the decree be raised prior to its entry by the trial court or on the appeal therefrom. It is axiomatic that a void decree is a nullity and may be collaterally attacked at any time.

Petitioners take issue with the assertion of respondent (Brief, p. 9) that the statute set out therein forecloses the

attack made by petitioners on the proceedings subsequent to the decree. Respondent there states that the statute limits the scope of inquiry on objections of confirmation to, among other things, questions relating to the regularity of the officer conducting the sale. Certainly when petitioners object to the officer selling the land in one tract in violation of the statute, they are raising a question related to the regularity of the proceedings of the officer conducting the sale. It therefore follows that there is no merit in respondent's contention (Brief, p. 10) that petitioners are asking this Court to issue a mandate directing the Supreme Court of Nebraska "to violate a local procedural statute, against which no complaint of invalidity has been made." Neither are petitioners asking this Court "to set aside its many decisions announcing a principle of practice uniformly adhered to throughout the history of the State, and grant relief to petitioners when it has uniformly refused relief to others in identical circumstances." On the contrary, petitioners are asking this Court to direct the Nebraska Supreme Court to follow the Nebraska statutes, to follow its former decisions which have not been overruled, and to grant petitioners the same relief which the court has extended to other citizens of the State in every case heretofore presented to the Nebraska Supreme Court (cf. *City of Scottsbluff v. Acton*, *Taylor v. Evans*, Sec. 77-2045, C. S. 1929).

On pages 3 and 5 of its brief, respondent suggests that there might have been other evidence before the trial court which would support a finding that the land was assessed as one tract rather than separately assessed. (Had there been any such evidence respondent should have called it to this Court's attention in its brief.) This case will be examined on the record before the court, and this Court will not speculate on what other evidence *might* have been before the trial court. Furthermore, records relating to

the assessment of taxes and the acts of the tax officers in the premises are conclusive and not subject to impeachment by parol evidence (22 C. J. 1085, Sec. 1428). The best and primary evidence of the fact, nature and amount of assessment is the assessment book or list itself (61 C. J. 622, Sec. 27). The assessment records herein are in the printed record (R. 32-44). The court will therefore not assume that the records were impeached at the trial by extraneous evidence not in the printed record.

On page 5 of its brief, respondent complains that no motion for rehearing was filed on the first appeal "while the Supreme Court of Nebraska had jurisdiction of the cause and the power to correct any errors it might have made in its decision," and states "The record thus fails to show that any Federal question relating to the validity of the decree of the trial court or the opinion and judgment of the Supreme Court was ever before that court while, in accordance with State practice, it was proper for that court to entertain and decide it." (Italics ours.) The utter fallacy of such a contention lies in that it completely overlooks the fact that the attack on the decree itself was collateral; certainly the attack on the proceedings subsequent thereto, including the sale and its confirmation, were made while both the trial and the Supreme Court had jurisdiction of such proceedings on direct attack. The statement quoted from the Nebraska Supreme Court's opinion on page 9 of respondent's brief, "Defendants attack here *is not upon the proceedings had subsequent to the decree*, but upon the decree itself, and upon the questions of fact and law that were determined in the decree. They are not reviewable upon objections to the confirmation of the sale" is contrary to the record. See assignments of error numbered 1, 2, 7, 8, 9 (R. 28, 29), all of which are directed to the proceedings subsequent to the decree.

There are only two reasons why the opinion on the first appeal need be examined by this Court. First, to determine whether the court was without jurisdiction to enter such decree and whether, therefore, the decree is subject to collateral attack; second, whether the questions raised in the second appeal, by collateral attack on the decree, and by direct attack on the proceedings subsequent thereto, were before the court in the former appeal and therein decided. We respectfully submit that these questions must be resolved in favor of petitioners' contentions herein.

On pages 2 and 3 of its brief, respondent undertakes to state the issues decided by the trial court. It may be pointed out that respondent's discussion is directed to the proceedings on the first trial, in which the decree was entered, and not to the hearing on confirmation. The only question there decided was that although the two descriptions of the two 75.2-acre tracts were identical and interchangeable, to-wit (Pt. NW $\frac{1}{4}$, Sec. 24, Twp. 22, Range 55, 75.2 acres and Pt. NW $\frac{1}{4}$, Sec. 24, Twp. 22, Range 55, 75.2 acres) (R. 32-44 and 52), yet such descriptions were sufficient to identify each tract. We challenge the correctness of respondent's assertion (Brief, p. 3) that the trial court also found that the assessment "had in fact been made against a single tract listed upon the tax records on two lines." No such finding is in the record.

Respondent asserts (Brief, p. 5) that petitioners' counsel "overlook the court's discussion of both the local case law and statute law as applied to the distinguishing facts of this case." Counsel, on the contrary, have pointed out in their brief that the distinction attempted by the Nebraska Supreme Court is arbitrary and without ground, and is an attempt to evade the constitutional question raised by petitioners.

Respondent also asserts (Brief, p. 7) that the discussion of the Nebraska Supreme Court, in its opinion on the

second appeal (R. 49, 50), of the constitutional question was "purely dictum." Petitioners raised the Federal question on that appeal. The court rejected their contention and held that no constitutional right had been denied them. In *Richmond Screw Anchor Co. v. U. S.*, 48 S. Ct. 194, 275 U. S. 331, 72 L. Ed. 303, this Court held that the reason for a court's conclusion is not obiter dictum merely because another reason was more fully argued and considered. And in *U. S. v. Title Insurance & Trust Co.*, 44 S. Ct. 621, 26 U. S. 472, 68 L. Ed. 1110, the court held that where there were two grounds on either of which an appellate court may rest its decision and it adopts both, the ruling on neither is obiter, but each is the judgment of the court.

Be that as it may, if the court did decide the Federal question, which it did, its decision deprived petitioners of their constitutional rights; if it did not decide it, the failure to do so likewise deprived them of such rights, there being no question that the question was timely and properly presented.

John v. Paullin (Respondent's Brief, p. 7) is not in point. The Supreme Court of Oklahoma did not pass on the merits of the case, but merely held that it had no jurisdiction because the procedural statutes governing appeals had not been complied with. No such question is here involved.

Nor is the case of *Atlantic C. L. R. Co. v. Minis* cited by respondent in point. The constitutional rights were timely and properly claimed by petitioners under the Nebraska practice. Petitioners, with reluctance, are compelled to the conclusion that the decision of the Nebraska court denying them their constitutional rights was clearly "rendered in a spirit of evasion for the purpose of defeating the claim of Federal right."

Conclusion

When a judgment is absolutely void for want of jurisdiction of the court to enter it, it may be attacked directly or by collateral attack. The right to collateral attack is not lost by failure to make a direct attack. For the purpose of collateral attack, a court never loses jurisdiction. The attack on the sale and its confirmation could not be made until after the sale and confirmation. Even if the decree were not subject to collateral attack, the attack on the sale and confirmation is not collateral, but direct. The sale and confirmation deprived petitioners of their asserted constitutional rights fully as much, if not more so, than the decree itself. It follows therefore that the Federal question was timely presented. Thus, the only objection to this Court's jurisdiction, being wholly without merit, it is respectfully submitted that a writ of certiorari should be granted as prayed for.

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